

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

B
Pls

75-2052

To be argued by
E. THOMAS BOYLE

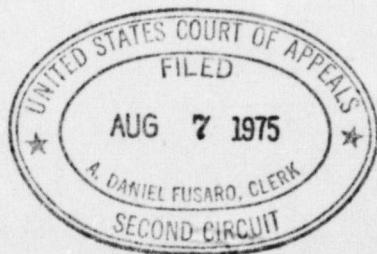
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. :
CARL BUFORD, :
Relator-Appellant, :
-against- :
ROBERT J. HENDERSON, :
Superintendent, :
Auburn Correctional Facility, :
Respondent-Appellee. :
-----x

Docket No. 75-2052

REPLY BRIEF FOR RELATOR-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Relator-
Appellant CARL BUFORD
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

E. THOMAS BOYLE,
Of Counsel

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The State, in its brief, relies basically on a two-pronged argument to support the District Court's refusal to provide appellant with a copy of the State court record below. The State maintains that (1) appellant failed to exhaust his State court remedies, and that (2) he has shown no need for the State court record. Neither of these contentions has merit.

I

The State contends that a petitioner who has raised substantive issues in a direct appeal to the State courts and, thus having met the exhaustion requirements of 28 U.S.C. §2254, presents those issues to a Federal district court, must return to the State courts for a copy of the State court transcript.* However, 28 U.S.C. §2254(c)** provides that the exhaustion requirement pertains to "the question presented," which clearly refers to the substantive grounds for relief set forth in the petition. Moreover, 28 U.S.C. §2254(e) mandates that where a challenge is made to

*The State claims that no relief for appellant is proper here since the due process clause does not apply. Its reasoning is that the State of New York did not deny appellant the transcript and that therefore there was no action constituting a violation of constitutional rights.

However, the State misconstrues appellant's position. The violation of due process and equal protection asserted here arises from the Federal District Judge's conduct in denying appellant's motion requesting that the State supply him with a copy of the transcript. Clearly the conduct of Federal judges is governed by the Fifth Amendment, which is "broad enough to encompass the Fourteenth Amendment equal protection and due process, at least in transcript cases." MacCollom v. United States, 511 F.2d 1116, 1122 n.7 (9th Cir. 1974); see also Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

**This subdivision provides:

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

the State court's determination of factual issues, and where the petitioner is indigent and for this reason cannot afford to produce the State court record to support his claims -- both of which exist here -- then the District Court must direct that the State produce that record.* MacCollom v. United States, supra, 511 F.2d at 1118. In only this way can the Federal habeas corpus petitioner hope to overcome the statutory presumption of 28 U.S.C. §2254(d) that the State court findings are correct.**

*28 U.S.C. §2254(e) provides:

If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

Pursuant to 28 U.S.C. §2250, a habeas corpus petitioner permitted to proceed in forma pauperis is entitled to those documents on file with the clerk without cost, as the District Court directs.

**The State's reliance in Point III of its brief on the statutory presumption of correctness to support its contention that the State court judge made a correct determination of the factual issues raised in the pre-trial

Furthermore, appellant has no State court procedure available to him to obtain his transcript. Having raised his claims in his direct appeal from the judgment of conviction, no State collateral proceeding is open to him (see C.P.L. §440.10), and the State provides no method of obtaining a record independent of a pending State proceeding. Thus, appellant properly raises his claim for the transcript here. See, e.g., United States ex rel. LaNear v. LaVallee, 306 F.2d 417, 419 (2d Cir. 1962).

United States ex rel. Haines v. Patterson, 365 F. Supp. 839 (S.D.N.Y. 1973), relied upon by the State, is totally different from this case. In Haines, the sole claim of the petitioner was that the State had failed to provide Haines with a copy of the State court record which he wanted in order to file a collateral proceeding in the State courts challenging a State judgment conviction. As Judge Frankel there pointed out (365 F.Supp. at 840), this is the question which the Supreme Court left open in Wade v. Wilson, 396 U.S. 282, 286 (1970). The facts of Haines,

(Footnote continued from the preceding page)

suppression hearing is further proof of the impossible burden placed on appellant below, and further highlights his critical need for documents in the State court record in order to pursue his claims. While the State maintains that the minutes were never filed, it should be noted that part of the suppression hearing was stipulated based on the grand jury testimony as well as the preliminary hearing. It is highly unlikely that these documents are all unavailable.

however, are a far cry from those here, for, having completed his state court challenge, appellant is properly in the Federal court.

II

The State's argument (State Brief, Point II) that appellant has failed to show any "need" for the State court transcript is, on this record, frivolous. No such requirement can be interposed between an indigent and his rights.

McCollom v. United States, supra, 511 F.2d at 1120-1124, Ninth Circuit held that a Federal prisoner wishing to proceed under 28 U.S.C. §2254 does not have to make a showing of particularized need in order to obtain a copy of the district court record.* In reaching this conclusion, that Court gave consideration to the words of Mr. Justice Marshall in Britt v. North Carolina, 404 U.S. 226 (1971).** Speaking for the Court, Mr. Justice Marshall stated:

We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a

*This Court will soon be presented with this issue in Crossley v. United States, Doc. No. 75-2077.

**The Court there held that, in the absence of an adequate alternative, the defendant was entitled to a transcript of a mistrial.

showing of need tailored to the facts of
the particular case.

Id., 404 U.S. at 228.

As the Court in MacCollom so aptly stated:

[W]e do not read the Supreme Court's opin-
ions nor the Constitution itself to require
paupers to have better memories than the
affluent.

Id., 511 F.2d at 1122.

Further, there is proof in the record below that appellant needed the State court record to pursue the habeas corpus proceeding he had initiated. Appellant's Main Brief at 15-18. The State (State's Brief, at 18-19) asserts that there was no need for the State transcripts with regard to Claims I(d), II, and IV, which challenge the sufficiency of the evidence, because under Thompson v. Louisville, 362 U.S. 199, 206 (1960), the resolution of this issue "turns not on the sufficiency of the evidence but on whether the conviction rests upon any evidence at all."* This standard, which the District Court applied at the State's urging, is not the proper standard. Insufficiency of the evidence as to any element of the State crime is a violation of due process:

*It is this standard which apparently misled the District Court to reject appellant's claims without examining the State court record.

"...[A] conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process."

Vachon v. New Hampshire,
404 U.S. 478, 480 (1974),
quoting Harris v. United States, 404 U.S. 1232, 1233 (1971).

To present such an issue to the court properly, appellant needed the State court record.

CONCLUSION

For the above-stated reasons and the reasons set forth in appellant's main brief, the order of the District Court must be vacated and the case remanded to the District Court with instructions that appellant be provided with a copy of the State court record.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Relator-
Appellant CARL BUFORD
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

E. THOMAS BOYLE,
Of Counsel.

CERTIFICATE OF SERVICE

August 4 1975

I certify that a copy of this brief [redacted]
has been mailed to the Attorney General of the State
of New York.

reply

E. Thomas Boyle